

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

29315

FILE: B-213135

DATE: September 14, 1984

MATTER OF: Wiltron Company

DIGEST:

1. A protester is entitled to wait to file its protest with GAO until receipt of formal notification from the agency that its offer has been found technically unacceptable where the agency continued to evaluate the offer before sending the notification.
2. The first step of a two-step formally advertised procurement contemplates the qualification of as many technical proposals as possible under negotiation procedures, and requires that an agency make reasonable efforts to bring step one proposals to an acceptable status.
3. It is improper to reject a step one proposal on the basis of perceived deficiencies in a "bid sample" without giving the proposer an opportunity, through negotiation, to show the agency that its equipment is, or can readily be modified to be functionally equivalent to the design specified in the solicitation, where the result will be a sole-source procurement.

Wiltron Company protests certain matters under solicitation No. LRFBS N00104-83-B-0376 issued by the Department of the Navy. The solicitation was conducted by the two-step formal advertising method. The procurement was for the acquisition of 37 microwave sweep generators to test the operational performance of various electronic systems aboard Navy vessels, particularly in certifying the performance of the radio frequency (RF) circuitry of prime systems aboard nuclear submarines, such as antennae assemblies and periscopes. Wiltron argues that the specifications were overly restrictive, that its product

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was improperly determined to be technically unacceptable, and that the successful offeror's product in fact does not meet the specifications. We sustain the protest.

Background

Two-step formal advertising is a hybrid method of procurement, combining the benefits of formal advertising with the flexibility of negotiation. The step one procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. Step two is conducted in accordance with formal advertising procedures, with the exception that the competition is limited to those firms that submitted acceptable technical proposals in step one. Defense Acquisition Regulation (DAR), §§ 2-501 to 2-503.2, reprinted in 32 C.F.R. pts. 1-39 (1983).

The solicitation set forth the salient characteristics of the generator sought, but noted that the government would consider "equal" items that had existing commercial applications, the quality and suitability of which had to be evidenced by substantial market acceptability. Step one requested the submission of technical proposals and accompanying samples. Offerors were required to submit their samples to the Naval Research Laboratory by the May 13, 1983 closing date.

Wiltron protested the terms of the solicitation to the contracting officer on May 4, asserting that the specifications were based on the design of Hewlett-Packard Company's sweep generator and therefore that they were unduly restrictive of competition. Wiltron, however, continued to participate in the procurement and submitted a sample of its sweep generator model 6668A for testing. The only other offeror was Hewlett-Packard, which offered its model 8350B with related plug-in units and options. On June 27, the Navy responded in writing to a congressional inquiry concerning Wiltron's protest, stating that the specifications at issue were based on "actual fleet requirements," and that Wiltron's sample was being tested to determine if it met the Navy's minimum requirements.

Wiltron subsequently met with Navy technical officials on July 21 to discuss the Navy's reply to the congressional inquiry. By two separate letters dated September 13, the contracting officer denied Wiltron's protest and rejected the firm's proposal as technically unacceptable specifically because: (1) Wiltron's generator

was not a commercially available product; (2) Wiltron failed to provide an attenuator (a device for decreasing the amplitude of an electrical signal) with its bid sample; and (3) the generator's performance fell below a certain minimum leveled output of power in the 18 to 26.5 gigahertz (GHz) frequency range. Wiltron then filed a protest with this Office on September 22. While the protest was in development, the Navy canceled the solicitation and ordered 19 sweep generators from Hewlett-Packard under a basic ordering agreement (BOA).^{1/}

Timeliness

The Navy contends that Wiltron's protest is untimely. The Navy notes that our Bid Protest Procedures require that protests alleging solicitation improprieties in a request for proposals be filed before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1984). Since Wiltron did not file its protest with this Office until September 22, which was well after the May 13 closing date, the Navy contends that the portion of the firm's protest dealing with restrictive specifications is therefore untimely. In any event, the Navy asserts, Wiltron knew or should have known the basis of its protest at least by July 21, the date that the firm's representatives met with Navy officials, and thus its protest should have been filed within 10 working days after that date in accordance with our Procedures at 4 C.F.R. § 21.2(b)(2).

We do not agree that Wiltron's protest is untimely. Contrary to the Navy's position, Wiltron in fact did comply with section 21.2(b)(1), since the firm clearly filed a protest with the contracting officer on May 4, which was more than a week prior to the closing date.

We also note that the Navy is mistaken in implying that Wiltron failed as well to comply with section 21.2(a) of our Procedures, which provides that if a protest has been initially filed with the contracting agency, any subsequent protest to this Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest.

^{1/} We do not believe, nor does the Navy argue, that the cancellation and award to Hewlett-Packard render Wiltron's protest moot.

We have construed the phrase "actual or constructive knowledge of initial adverse agency action" to include knowledge that the agency has proceeded with a bid opening or proposal closing without correcting the alleged defect in the solicitation. See Central Air Service, B-213205, Feb. 6, 1984, 84-1 CPD ¶ 147. In this case, however, we cannot conclude that the May 13 closing constituted initial adverse action on Wiltron's May 4 protest to the agency. Here, an offeror could reasonably infer from the solicitation that sweep generators that did not meet all the salient characteristics, but that were somehow "equal" to those characteristics, would be acceptable. Thus, even though the contracting officer proceeded with the proposal closing in the face of Wiltron's protest, it was not clear at that point that the alleged restrictiveness of which Wiltron complained would eliminate the firm's sweep generator from consideration. Therefore, that portion of Wiltron's protest alleging solicitation improprieties was not untimely filed, even though the firm refrained from protesting to this Office until it received formal notification from the Navy denying its earlier protest.

We also reject the Navy's contention that Wiltron knew or should have known the basis of the remainder of its protest at least by July 21, the date of Wiltron's meeting with Navy officials, and thus should have filed its protest with this Office within 10 working days of that date under 4 C.F.R. § 21.2(b)(2). The Navy's position during the July 21 meeting was that technical officials were still testing the Wiltron generator, although it is apparent that there was at least some indication that it might not prove to be acceptable. However, in our view, there was no reason at that point for Wiltron to presume conclusively that its generator would not be determined to be "equal" to the salient characteristics in the final analysis. Therefore, we believe that the remainder of Wiltron's protest was timely filed within 10 working days of formal notification.

Specification Restrictiveness and Rejection of Wiltron's Offer

Wiltron contends that the specifications were unduly restrictive, alleging that certain of the salient characteristics listed in the specifications and the "commerciality" requirement exceeded the Navy's actual minimum needs. Wiltron itemizes those characteristics and sets forth the reasons it believes they were restrictive. The firm asserts that the rejection of its offer as technically unacceptable was improper since its sweep generator

in fact met the Navy's actual minimum needs at a substantially lower price per unit than Hewlett-Packard's offer. Lastly, Wiltron contends that Hewlett-Packard's equipment itself does not meet certain solicitation requirements.

Determinations of the government's minimum needs and the best methods of accommodating those needs are primarily the responsibility of the contracting agency. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD ¶ 539. More specifically, we have recognized that government procuring officials generally are in the best position to know the government's actual needs, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future. While agencies generally must obtain the maximum competition practicable, there are instances when fulfillment of those needs may result in the imposition of some restriction on competition. Williams & Lane, Inc., B-210940, Aug. 29, 1983, 83-2 CPD ¶ 269.

However, in this respect, although an agency enjoys such broad discretion in determining its needs, when a protester challenges a particular specification as being unduly restrictive of competition, it is incumbent upon the agency to establish prima facie support for the reasonableness of the specification. Constantine N. Polites & Co., B-189214, Dec. 27, 1978, 78-2 CPD ¶ 437. Such prima facie support should consist of an explanation establishing a reasonable basis for the agency's determination that the restrictive specification is needed to meet the agency's minimum needs. Lista International Corporation, B-214231; B-214270, June 25, 1984, 63 Comp. Gen. ___, 84-1 CPD ¶ 665.

The Navy argues that the solicitation as drafted reflected its actual minimum needs and advances reasons for the salient characteristics contained in the solicitation. The Navy contends that the purchase of state-of-the-art sweep generators was necessary to enable precision testing of sophisticated electronic equipment aboard Navy vessels. The "commerciality" requirement, the Navy continues, reflected the opinion of technical officials that testing of a noncommercial product would be too costly, and that such commercial availability

would be a reasonable indication of the generator's reliability. The Navy consequently believes that rejection of Wiltron's offer was appropriate since the firm's sweep generator was determined by technical officials not to meet the Navy's requirements. In light of the fact that rejection of Wiltron's technical offer during step one of the procurement was proper, the Navy concludes, the allegedly lower price Wiltron would have submitted had it participated in step two was never a factor for consideration.

The solicitation at ¶ 2.5 required that the sweep generator have five frequency markers for both amplitude and intensity. The Navy explains that it requires five markers because of the increasing complexity of the prime systems being tested. For example, the Navy states that "one of the tests of the AN/WLQ-4(V) system requires simultaneous marking of the upper and lower three decibel (dB) points and the minimum and maximum gain points across the octave band under test." The fifth marker, according to the Navy, is for "trouble-shooting" purposes. To the contrary, Wiltron asserts that three markers are sufficient, and actually cause less confusion to personnel operating the generators. Wiltron contends that five different frequencies can be set on its model 6668A as it exists, because the two ends can also be adjusted. Therefore, according to Wiltron, five tests can in fact be simultaneously marked on its generator. In any event, Wiltron argues that it could easily have added two additional markers.

The Navy has not refuted this, nor has it asserted that Wiltron's generator cannot set and mark five different frequencies in order to perform the requisite testing, as the firm claims. If the Navy legitimately required five frequency markers, we fail to see why the agency could not have conducted meaningful discussions with the firm in order to achieve the desired conformity. Cf. The Management and Technical Services Company, a subsidiary of General Electric Company, B-209513, Dec. 23, 1982, 82-2 CPD ¶ 571. Therefore, we conclude from the record that Wiltron should not have been rejected for offering a three marker generator without being given an opportunity through discussions to correct the deficiency.

The solicitation at ¶ 4.6 required that the maximum leveled output power of the generator for the frequency range of 18 to 26.5 GHz was to be +10 dB, minimum. The Navy states that this requirement was dictated by the sophisticated nature of the equipment being tested and that, while output power greater than +10 dB was desirable, the state-of-the-art has not advanced any further. The output of Wiltron's unit, the Navy points out, was measured at only 7 dB.

According to Wiltron, the two or three dB shortfall in its generator for this band of output power is more than made up for by the fact that its incorporated detector can measure levels as low as -55 dB, thus offering a higher degree of sensitivity. In addition, Wiltron asserts that if the generator antenna were moved closer to the prime system, the +10 dB would not be required.

We note that the agency has not refuted Wiltron's contention that its needs could be met by moving the generator's antenna closer to the equipment being tested, other than merely to state that it is not an offeror's prerogative to determine the method by which its product will be evaluated for performance capabilities. The record simply does not explain why the Wiltron generator could not have been successfully used with its antenna in closer proximity to the shipboard equipment since it does not appear to be equipment that is permanently installed. From the record before us, then, it appears that the Navy's testing method was arbitrary.

The solicitation at ¶ 3.11 specified that the "unit shall include a 70 dB attenuator in 10 dB steps." Wiltron's unit uses an external attenuator while the Hewlett-Packard generator has an internal attenuator. The Navy asserts that Wiltron's proposal was determined to be unacceptable because the firm failed to submit an external attenuator with its sample and not, as Wiltron contends, because Wiltron's unit did not feature an internal attenuator. However, the Navy apparently made no effort to permit Wiltron to supply an external attenuator after the proposal closing date, which would have been reasonable under applicable regulations,

see generally DAR, § 2-503, since it was the generator that was being evaluated and not the attenuator. Instead, the Navy penalized Wiltron for failing to supply one while at the same time apparently testing Wiltron's unit with an attenuator already in the Navy's possession. Since the attenuator is not a complicated device and can be readily supplied, we believe the Navy's actions in this regard leave much doubt as to the reasonableness of rejecting Wiltron's proposal for failure to provide an attenuator. Thus we conclude that rejection on that basis was improper.

The solicitation requested generators that had existing commercial applications and defined "commerciality" as:

"a privately developed product with a reliable history of performance in industry. The item is available off the shelf and is completely supported by spare parts, technical assistance, and repair facilities. The Contracting Officer may consider items which are existing commercial equipment with minor modifications, employing alternative methods and ranges, provided the equipment offered meets, as a minimum, the requirements of the . . . salient characteristics."

The Navy states that it developed the specifications after visiting manufacturers' plants, including Wiltron's, in order to determine what the state-of-the-art was in commercially available sweep generators. According to the Navy, the Wiltron model 6668A generator was a newly developed item, and the Navy asserts that it was told by Wiltron that it would not be put into production unless Wiltron received the award under the subject solicitation. The Navy informs us that it continued to test Wiltron's generator in order to give the

firm the maximum competitive consideration, but that the model 6668A's lack of "commerciality" ultimately became one basis for rejecting Wiltron's offer.

Wiltron does not believe that its generator failed to meet the "commerciality" requirement, stating that model 6668A was an integration of existing components, since the generator was made by "repackaging" the RF circuitry found in its model 6640A into its model 6659A, both of which had successful commercial histories. According to the Navy, however, these two earlier Wiltron models only had a "limited industry acceptance," and therefore model 6668A could not be deemed to be commercially available.

We have held that the determination as to whether an offered product is an actual commercial item is largely within the sound discretion of the contracting officer, and is not subject to question by this Office so long as evidence exists to support the contracting officer's conclusion. E.C. Campbell, Inc., B-203581.2, March 19, 1982, 82-1 CPD ¶ 256. However, we feel sufficient evidence to support the rejection of Wiltron's generator for lack of "commerciality" is not present here.

Wiltron states that commerciality is indicated by the performance records it furnished with the two model 6668A generators submitted as samples, including the repair history of each unit. According to Wiltron, the samples met the burn-in test requirements of MIL-T-28800, Type III, Class 5, which Military Standard the solicitation at ¶ 1.0 mandated that all offered sweep generators were to meet. The Navy does not challenge Wiltron's statements regarding burn-in testing. In our view, Wiltron's model 6668A should more properly have been regarded as the firm's latest commercial product, since it was apparently an integration of two earlier models which had commercial history. See Caelter Industries, Inc., B-203418, March 22, 1982, 82-1 CPD ¶ 265.

Conclusion

We are not here deciding whether or not the Wiltron unit will ultimately be found to be technically acceptable. However, after a survey of the industry the Navy

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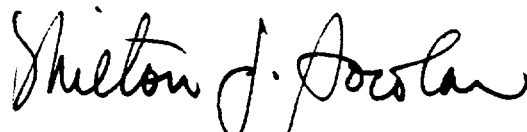
apparently decided that competition for this requirement was feasible and proceeded to procure the equipment on the basis of two-step formal advertising.

The first step of a two-step formally advertised procurement contemplates the qualification of as many technical proposals as possible under negotiation procedures. This requires that an agency make reasonable efforts to bring step one proposals to an acceptable status. See Essex Electro Engineers, B-210366, June 13, 1983, 83-1 CPD ¶ 650. From the record, it does not appear that the Navy made a reasonable effort here, with the result that the procurement was made on a sole-source basis. Rather, it appears that the Wiltron's proposal was rejected on the basis of perceived deficiencies in its sample, in the same manner as a standard bid sample in a formally advertised solicitation, without giving the firm an opportunity, through negotiation, to show the agency that its equipment either was, or could be readily modified to be, functionally equivalent to the Hewlett-Packard design upon which the specification was developed.

Because of our conclusion in this matter, we need not reach the other issues raised by Wiltron.

The protest is sustained.

Accordingly, we are recommending to the Secretary of the Navy by separate letter that the solicitations be reinstated, that step one negotiations be reopened for any remaining requirement for them, and that, pending the results of the reopened negotiations, no further sweep generators be purchased from Hewlett-Packard under the BOA.

for 
Comptroller General
of the United States

